

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 45 of 1981

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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KANSARA SONI SHASHIKANT KANJI

Versus

HEIRS OF KANSARA SONI JADURAM DHARSI

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Appearance:

MR SURESH M SHAH for Petitioners

MR CH VORA for Respondent No. 1

NOTICE SERVED for Respondent No. 2

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CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 27/09/2000

ORAL JUDGEMENT

This appeal arises of the judgment and order dated 30th October, 1980, passed by the learned Assistant Judge, Bhuj, in Regular Civil Appeal No. 38/78 arising of the Civil Suit No. 173 of 1973. The appellants are

the defendants nos. 1, 3 and 4 in the Civil Suit No. 173/73 instituted by the plaintiff, the respondent no. 1 herein, for redemption of the suit property. The plaintiff and the defendant no. 4 were the real brothers.

The plaintiff in the above referred Civil Suit No. 173/73 claimed ownership of the suit house and shop bearing Municipal Nos. 5/679 and 5/678, situated at Bhuj, in Ward No. 5. The suit property is a part of the larger property, which originally belonged to the ancestors of the plaintiff and the defendant no. 4 and was inherited by them. In a family arrangement, the Western half of the said property bearing Municipal No. 5/1266 came in the share of the plaintiff, and the Eastern half of the said property bearing Municipal Nos. 5/678 and 5/679 i.e. the suit property came in the share of the defendant no.4. On 13th August, 1970, the suit property was mortgaged by the defendant no.4 to one Rayma Husen Suleman for Rs.3500/- by a registered-deed. The possession of the suit property was handed over to the mortgagee Rayma Husen Suleman, who assigned the suit property to the defendant no. 1 for Rs.4000/- under a registered document dated 20th November, 1971. The defendant no. 1 was thus a mortgagee in possession of the suit property. On 12th July, 1973, the defendant no.4 released the suit property in favour of the plaintiff for a sum of Rs.6000/-. Thus, the plaintiff became the sole owner of the suit property and had a right to redeem the suit property. A notice of redemption of the suit property was given by the plaintiff and the defendant no.4 on 13th February, 1973. Under the release-deed dated 12th July, 1973, the plaintiff was obliged to pay Rs. 3500/- being the mortgage money to the mortgagee. The remaining amount of the consideration i.e. a sum of Rs. 2500/- was paid by the plaintiff to the defendant no. 4. The plaintiff thus became exclusive owner and became entitled to redeem the suit property. However, in answer to the notice, the defendant no.1 claimed that he was the tenant in the suit property and the defendant no.2 being his tenant and the defendant no.3 being his aunt residing with him, had a right to the suit property.

The learned trial Judge framed issues at Ex. 24. The learned trial Judge, however, decided the suit on preliminary issue alone and did not decide the other issues. The issue whether the plaintiff had a right to bring the suit, as alleged, was answered in negative and

the suit was dismissed without decision on other issues. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 38/78 in the District Court, Kutch at Bhuj. The learned Assistant Judge, Bhuj, by his judgment and order dated 30th October, 1980, reversed the judgment of the learned trial Judge and held that the suit at the hands of the plaintiff was maintainable. Having held that the suit was maintainable, the learned Assistant Judge proceeded further and decided all the matters at issue. At the end, the appeal was allowed. Decree for redemption of the suit property by the plaintiff against the defendant no.1 and delivery of possession from the defendants nos. 1 and 2 was passed. The defendants nos. 3 and 4 were restrained from obstructing or interfering in recovering the possession thereof and the plaintiff was directed to pay a sum of Rs.4000/- to the mortgagee, and on payment of such amount, the defendant no. 1 was directed to deliver the possession of the suit property and all the documents in his possession or power relating to the mortgaged property to the plaintiff. Feeling aggrieved, the defendants nos. 1, 3 and 4 have preferred the present appeal. Pending this appeal, the appellants nos. 2 and 3 i.e. defendants nos. 3 and 4 have passed away and their heirs and legal representatives have not been brought on the record. The appeal by the said defendants has thus abated.

The following substantial questions of law have been framed by the court :

1. Whether the defendants nos. 2 and 3 are protected under the Rent Act and can there be a decree for possession of the premises in their occupation by the regular civil court in a redemption suit against the mortgagee ?
2. Whether can there be legal and valid release deed by the defendant no. 4 in favour of the plaintiff when admittedly previously document of 1952 Ex. 150 has been executed between the parties and pursuant to it, the plaintiff has made suitable changes in the property, which came to his share and put up the entrance etc. exclusively for the use of his share ?
3. Whether it is legally open to the lower court to pass the final judgment in this redemption of mortgage suit without passing any preliminary decree for taking accounts of the mortgage dues

and without ascertaining the dues of the mortgagee, pursuant to the mortgage document ?

Mr. Shah has relied upon Order 14 Rule 2 of the CPC, and has submitted that the trial court ought to have decided all the issues simultaneously, and since in the present case, the trial court has not decided all the issues, the suit ought to be remanded to the trial court for decision on all issues. In the alternative, he has relied upon Rules 414 and 415 of the Civil Manual. He has submitted that it was imperative for the first appellate court to frame points for determination. In the present case, admittedly, the first appellate court has failed to frame points for determination and the decision rendered without framing the points for determination is liable to be quashed and set aside. Therefore also the matter is required to be remanded to the first appellate court for proper decision on all the matters at issue after framing the points for determination. In any view of the matter, the Issue no. 3 framed by the trial court i.e. whether the suit was bad for non-joinder of necessary parties has not been decided by the first appellate court and therefore also an order of remand is warranted. He has also contended that the first appellate court has not rendered its decision on Issue No. 4 i.e. whether the defendant no.1 had proved that he had spent Rs.901-25 PS for improvement of the suit property. He has relied upon the judgments of this court in the matters of CHETAN TEXTILES VS M/S JETHABHAI HIRJI & CO. & ORS (1984 GLH 1972) and ISMAIL HAJI MOHAMMED ABRAHANI & ANR VS THE STATE OF BOMBAY (NOW GUJARAT) (1966 GLR 208), and the provisions contained in Order 34 Rule 10 CPC.

Order-14 Rule 2 since its amendment with effect from 1st February, 1977, enjoins upon a court to pronounce judgment on all issues. Rule 414 of the Civil Manual provides that the appellate court should frame suitable points for determination in appeal in accordance with the same principle on which the issues are framed in the trial court. Rule 415 of the said Manual provides that the first appellate court should formulate its conclusion on all questions of facts precisely and clearly. Order 34 Rule 10 CPC provides for payment of cost of mortgagee subsequent to decree.

In the matter of Chetan Textile (supra), the trial court having framed the issues and after recording

evidence on all the issues gave finding only on one issue. The court held that the mode adopted by the trial court was not permissible under law and remanded the matter for decision on all issues. In the matter of Ismail Haji Mohammed (supra), the lower appellate court had similarly dismissed the appeal, against which a Second Appeal was preferred before this court. Reliance was placed on Circular No. 410 issued by the High Court. The High Court set aside the order of the lower appellate court and remanded the matter to the District Court for decision on all issues in accordance with Circular No. 410 issued by the High Court.

Mr. Vora has submitted that it is not imperative for the appellate court to remand the matter to the trial court. The power to remand the matter should be exercised only where the evidence on the record is insufficient for determination of any issue necessary for the disposal of the appeal. He has relied upon section 103 CPC and the judgments of the Hon'ble Supreme Court in the matter of ASHWINKUMAR K. PATEL VS UPENDRA J. PATEL & OR ( {1993} 3, SCC 161 ); MARIMUTHU MUTHIRIAR VS AYYATHURAL ( AIR 1978 MADRAS, 246); and ASSISTANT COMMISSIONER, TUMKUR & ORS VS K.N.NAGARAJA (AIR 1983 KARNATAKA, 111). Section 103 CPC reads as under :

S-103 : POWER OF HIGH COURT TO DETERMINE ISSUE OF FACT :

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal -

- (a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or
- (b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in section 100.

He has relied upon Order-41 Rule-23 CPC. Order-41 Rule-23 CPC empowers the appellate court to remand a suit disposed of by the trial court upon a preliminary point and a decree is reversed in appeal. It is evident that provision contained in Rule-23 of Order-41 CPC empowers the appellate court to remand the suit if it thinks fit

i.e. it is not imperative for the appellate court to remand a suit in all cases where the suit is disposed of on preliminary point and the decree is reversed in appeal. Further even section 103 CPC empowers the High Court to decide issues which have not been determined by the lower appellate court or both by the court of first instance or the lower appellate court or which has been wrongly determined by such court or courts where there is sufficient evidence on record to decide such issue.

Hence, in my view, Mr. Vora is right in submitting that in all cases where suit is disposed of on a preliminary issue and the decree is reversed in appeal, suit need not be remanded to the trial court if there is sufficient evidence on record to decide the issues even by the appellate court. In the matter of Assistant Commissioner, Tumkur (supra), Karnataka High Court has held that the judgment of the first appellate court can not be vitiated for the reason that he has not formulated the points for his decision at the very commencement of his judgment. A substantial compliance with the requirement of Order-41 Rule-23 CPC would be sufficient and any little deviation therefrom should not be a ground to set aside the entire judgment on that account. In the matter of M.Muthiriar (supra), Hon'ble Supreme Court has held that - " The provisions contained in Rr. 7, 8 and 9 of O. 34 CPC contemplating the passing of preliminary decree first and final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor has in fact deposited the mortgage amount even at the time of filing of the suit, it is not as if the court has no jurisdiction to straightway pass a decree for redemption without passing a preliminary decree and waiting for an application for a final decree to be filed ".

In the present case, it is not disputed that all evidence, which the parties desired to lead, was placed before the trial court, however, though the trial court disposed of the suit on preliminary issue alone. The only point for determination framed by the first appellate court was - "Whether the learned trial Judge erred in holding that the plaintiff-appellant was not entitled to bring the suit." No other point for determination was framed by the first appellate court, but it did proceed further to decide all the matters at

issue and allowed the appeal after deciding all the issues. In my view since the complete evidence was led by all the parties, the first appellate court was not wrong in not remanding the suit for decision on all issues and deciding all issues itself. I believe there is substantial compliance with the provisions of Order-41 Rule-23 CPC and no order for remand is called for as submitted by Mr. Shah. The question is whether the court below was obliged to pass a preliminary decree as envisaged under Order-34 Rule-7 CPC and to order taking of account under the said Rule. As held by the Madras High Court, such procedure is provided for with a view to giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But if there were no dispute regarding the amount due to the mortgagee, the court has the jurisdiction to straightway pass a decree for redemption without passing a preliminary decree and waiting for an application for final decree to be passed. In the present case, even while deciding the preliminary issue, the trial court had found that a sum of Rs.4000/- would be payable to the mortgagee i.e. the defendant no. 1. The said judgment has not been challenged by the defendant no.1. If in that case, the first appellate court has directed the plaintiff to pay a sum of Rs.4000/- to the mortgagee - the defendant no.1, the judgment and order would not be vitiated. Besides, as regards the claim of the defendant no.1 for a sum of Rs. 901-25 PS. towards the cost of improvement of the suit property, Mr. Vora states that the plaintiff does not dispute the said claim. In that case, the same can be awarded without seeking recourse to the elaborate procedure provided under Order-34 Rule-7 CPC.

In view of the above discussion, I see no justification in the claim for remand made by Mr. Shah. The matter is not required to be remanded either to the trial court or to the first appellate court just with a view to completing certain procedural requirement which otherwise are substantially complied with. Be it noted that there has been no challenge to the finding recorded by the first appellate court or its decision as such.

It appears that pursuant to the objection raised by the defendant no.1, the plaintiff amended the cause-title of the plaint and impleaded the defendants nos. 3 and 4. In that view of the matter, the plea of nonjoinder of necessary parties shall not survive. I hold that the release-deed executed by the defendant no.4 in favour of the plaintiff was legal and valid and that the court below was within its jurisdiction in passing

the final decree against the defendant no.1 without there being a preliminary decree and an order for taking accounts as envisaged under Order 34 Rule-7 CPC.

The appeal, therefore, fails. The appeal is dismissed. The judgment and order dated 30th October, 1980, passed by the learned Assistant Judge, Bhuj, in Regular Civil Appeal No. 38/78 is confirmed. The plaintiff-respondent no.1 is directed to pay a sum of Rs.4000/- being the mortgage money to the mortgagee-the defendant no.1 (as directed by the first appellate court). The plaintiff shall also pay a sum of Rs.901-25 PS. to the defendant no.1 towards the cost of improvement of the suit property. Both the above-referred amounts shall be deposited in the trial Court on or before 30th November, 2000. On plaintiff depositing such amount, the defendant no.1 shall deliver the plaintiff all the documents in his possession or power relating to the suit property and deliver the possession thereof free from mortgage and free from all encumbrances or from any person claiming under him. The appellant shall bear the cost of this appeal.

( MS R.M.DOSHIT J )

JOSHI